Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1993

Sandy Diana Hirras,
Petitioner,

v.

National Railroad Passenger Corporation,
D/B/A Amtrak,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Fifth Circuit held (in conflict with the holdings of three other circuits), the grievance arbitration system established by the Railway Labor Act, 45 U.S.C. § 153, denies federal courts jurisdiction to hear employment-related claims brought by railroad employees against their employers under federal labor standards statutes, including statutes—like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*—that specifically assign jurisdiction to the federal courts.

2. Whether, as the court below also held, the Railway Labor Act's grievance arbitration system preempts both state and federal court jurisdiction to hear state law claims in which railroad employees allege that their employers have violated state laws—such as the law prohibiting intentional infliction of emotional distress—that protect employees from abusive employer treatment.

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SANDY DIANA HIRRAS,

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NATIONAL RAILROAD PASSENGER CORPORATION,
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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sandy Diana Hirras, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Hirras v. National R.R. Passenger Corp.*, 5th Cir. No. 92-5753 (January 7, 1994).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 10 F.3d 1142 (1994), and is reprinted in the Appendix to this Petition ("App.") at 1a. The November 17, 1992 order of the United States District Court for the Western District of Texas, is reported at 826 F. Supp. 1062, and is reprinted at App.

15a. The October 11, 1991, order of the United States District Court for the Western District of Texas is unreported, and is reprinted at App. 21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 7, 1994. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-2(a)(1), provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 706(f) of Title VII, as amended, 42 U.S.C. § 2000e-5(f), provides, in pertinent part, as follows:

> (1) . . . . If a charge filed with the [Equal Employment Opportunity] Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the

> respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .
>
> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Section 3, First (i), of the Railway Labor Act ("RLA"), as amended, 45 U.S.C. § 153, First (i), provides, in pertinent part, as follows:

> There is established a Board, to be known as the National Railroad Adjustment Board" . . . and it is provided— . . . .
>
> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner,

> the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

The full text of § 3 of the RLA, 45 U.S.C. § 153, is reprinted at App. 32a-43a.

STATEMENT OF THE CASE

A. Statement of Facts

1. Petitioner, Sandy Diana Hirras, worked as a ticket clerk for respondent National Railroad Passenger Corporation ("Amtrak") at its station in San Antonio, Texas, from February 9, 1989 until June 11, 1989. As alleged in the complaint, petitioner was, during this period, subjected to a work environment in which she suffered severe sexual harassment: she was verbally abused by coworkers, received abusive and obscene telephone calls and notes, and was the subject of obscene graffiti spray-painted onto a door at the station. App. 2a, 16a & 27a. Although she complained to her supervisor, nothing was done, and the environment of sexual harassment continued. *Id.* Petitioner suffered severe emotional distress which compelled her to take a leave of absence from her employment on June 11, 1989, and which thereafter left her unable to return to work. App. 27a-28a.

As a result of these events, petitioner—after filing a charge of gender-based discrimination with the Equal Employment Opportunity Commission ("EEOC")—filed this action against Amtrak on October 30, 1990, in the United States District Court for the Western District of Texas. Hirras claims, *inter alia*, that Amtrak, by subjecting her to a hostile work environment because of her gender, committed (a) unlawful gender-based discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and (b) intentional infliction of emotional distress under Texas law. App. 25a, 29a.

B. Statement of the Proceedings Below

1. In separate orders, the district court dismissed Hirras' Title VII claim and her state law intentional infliction of emotional distress claim. App. 15a, 21a. Each dismissal was on the pleadings, and thus assumed all facts alleged in the complaint to be true.

a. In its order dismissing petitioner's Title VII claim, the district court adopted the theory that the exclusive jurisdiction of the RLA grievance adjustment board system bars from the courts "virtually any dispute between a railroad and a railroad worker that arises out of the employment relationship . . . , regardless of whether it involves the collective bargaining agreement or is independent of the agreement." App. 19a. In the district court's view, a railroad employee asserting employment-related rights—even if rights under an explicit federal statute, such as Title VII—may *only* assert such rights before the RLA's grievance adjustment boards. *See* App. 20a.[1]

Because Title VII claims are "claim[s] . . . founded upon some incident of the employment relation," the dis-

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[1] The RLA governs collective bargaining in the railroad and airline industries. With respect to the railroad industry, the Act establishes the National Railroad Adjustment Board ("NRAB"), an arbitration tribunal that conducts its business in four divisions, each of which has jurisdiction over different crafts of rail employees. 45 U.S.C. § 153, First (h). Each division is composed of members appointed in equal numbers by the labor organizations representing the affected crafts and the various rail carriers, and is empowered to resolve "minor disputes," *viz.*, "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153, First (i). If a "minor dispute" cannot be resolved by majority vote among these members, the members select a neutral person to break the deadlock. *See* 45 U.S.C. § 153, First (*l*).

The RLA also permits the unions and carriers in the railroad industry to establish other arbitration tribunals as alternatives to the NRAB. *See* 45 U.S.C. § 153, Second.

And the RLA requires airline unions and carriers to establish similar arbitration tribunals for their industry. 45 U.S.C. § 184.

trict court ruled that such claims are within the exclusive jurisdiction of the RLA adjustment boards. App. 18a.

b. In an earlier dismissal order, the district court had dismissed Hirras' state law claim for intentional infliction of emotional distress under the related theory that such a claim is a "minor dispute" under the RLA—and thus exclusively within the jurisdiction of the RLA's grievance adjustment board system—"[i]f the state law claim is 'inextricably intertwined' with the terms and conditions of employment under the collective bargaining agreement." App. 23a (*quoting Morales v. Southern Pac. Transp. Co.*, 894 F.2d 743, 745 (5th Cir. 1990)). According to the district court this standard requires dismissal here because:

> In the instant case, plaintiff complains that she was harassed, that her supervisors failed to provide her with a non-hostile workplace, that she was forced to take a leave of absence because of the harassment, and that her medical condition prevents her from returning to work. These claims are all related to plaintiff's employment relationship with Amtrak. Evaluating these claims will require the Court to refer to and to interpret the terms of the CBA provisions governing promotion, assignment and displacements, seniority, sick leave, leave of absence, return from leave of absence or temporary assignment, and fitness for duty physical examinations. [App. 23a-24a.]

2. On appeal, a panel of the United States Court of Appeals for the Fifth Circuit—following reasoning quite similar to that of the district court—affirmed the district court's dismissal of the Title VII claim and the pendant state tort claim.

a. With respect to the Title VII claim, the Fifth Circuit panel reasoned as follows:

First, the panel agreed with the district court that the category of "minor disputes" over which the RLA's griev-

ance system has jurisdiction extends to employee claims "founded upon some incident of the employment relationship," including claims "independent of those covered by the collective agreement." App. 4a (*quoting Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945)).

Second, the panel then noted that the RLA's adjustment board system's "jurisdiction over minor disputes is exclusive." App. 4a (*citing Andrews v. Louisville & N. Ry.*, 406 U.S. 320 (1972)).

And third, the panel concluded that petitioner's Title VII claim—as a claim "founded upon an incident of the employment relationship between her and Amtrak"—is "a minor dispute under the RLA and subject to the exclusive jurisdiction of the [National Railroad Adjustment Board]." App. 8a.[2]

b. The Fifth Circuit recognized that its holding regarding the RLA and Title VII is in direct conflict with a decision of the United States Court of Appeals for the Second Circuit, *Bates v. Long Island R.R.*, 997 F.2d 1028, 1034-35 (2d Cir.), *cert. denied*, 61 L.W. 3375 (1993). The court below simply declared that "the Second Circuit erred in *Bates*." App. 12a.

c. As noted, the Fifth Circuit also affirmed the dismissal of petitioner's pendant tort claim for intentional infliction of emotional distress as preempted. The panel asserted that

> [T]o properly adjudicate Hirras's claim, the district court would have to construe the collective bar-

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[2] The panel added that this Court's recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), bolstered the panel's conclusion that the RLA's grievance system bars from the courts all Title VII actions by railroad employees. In *Gilmer*, this Court had held that, under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, an employment discrimination claim "can be subject to an arbitration agreement in a securities registration application." App. 7a.

> gaining agreement to determine what actions Amtrak was required to take in response to Hirras's complaints that she was being harassed. Moreover, if Hirras was successful on her claim, the district court would have to determine [Hirras's] substantive rights under the collective bargaining agreement in order to fashion an appropriate remedy. [App. 13a-14a (internal quotations and citations omitted).]

REASONS FOR GRANTING THE WRIT

This case presents two questions as to the relationship between the Railway Labor Act's "minor dispute" settlement machinery (*see* p. 5 n.1, *supra*) and state and federal laws that create minimum, substantive, labor standards protections that run in favor of individual employees without regard to whether an employee is covered by the RLA or by a collective bargaining agreement negotiated under the RLA.

With respect to petitioner's state law intentional infliction of emotional distress claim, the question presented by the dismissals below is identical in its substance to the questions that this Court has agreed to hear and resolve in *Hawaiian Airlines v. Norris*, Supreme Court No. 92-2058, *cert. granted*, 62 L.W. 3485 (Jan. 21, 1994) (reviewing a decision holding that the RLA's "minor dispute" system does *not* preempt an employee's state law action). The only difference is that the applicable state law claim in *Hawaiian Airlines* is based on the Hawaii common law of wrongful discharge while here the state law claim is based on the Texas common law of intentional infliction of emotional injury. The courts below rested their dismissals on the theory that any and all employment-related state law claims are preempted if any underlying working conditions at issue are subject to an RLA collective bargaining agreement. The courts' reasoning for finding preemption here would thus apply equally to state wrongful discharge laws, or, indeed, to myriad other state laws regulating employee working conditions.

Given the grant of certiorari in *Hawaiian Airlines*, it is clear that the state law question presented here is worthy of this Court's review. Accordingly, this case should, at the least, be held for this Court's decision in *Hawaiian Airlines*.

The Title VII question presented here is also closely related to the question presented in *Hawaiian Airlines*. The theory of the petition in *Hawaiian Airlines* is, in essence, the theory adopted by the Fifth Circuit below: *viz.*, that employment-related claims by RLA employees generally are within the exclusive jurisdiction of the RLA's "minor dispute" resolution system and thus barred from the courts. *See, e.g., Hawaiian Airlines*, Opening Brief of Petitioner 9-12, 23-30 (filed 3/3/94). In *Hawaiian Airlines*, petitioner seeks to apply this theory to a state law cause of action; the decisions below apply this theory to a federal cause of action under Title VII. Given that there is at least as significant a body of federal labor standards laws as there is of such state laws, there is at least as compelling a reason to review the Title VII holding below as there is to review the holding at issue in *Hawaiian Airlines*. And this Court's disposition of this aspect of the instant case should, therefore, at the least, also be held for the *Hawaiian Airlines* decision.

In fact, however, the decisions below present an issue for review that is distinct from and even more compelling than the *Hawaiian Airlines* issue, since the decisions below disable the federal courts from enforcing a major *federal* policy (*viz.*, the prohibition against employment discrimination that is embodied in Title VII) with respect to a sizeable portion of the American workforce (*viz.*, all employees covered by the RLA), *despite an explicit federal statutory assignment of jurisdiction to the federal courts.* 42 U.S.C. § 2000e-5(f).

Moreover, as we develop at length in the discussion that follows, the Fifth Circuit's ruling that the RLA does have that legal effect is in conflict with the decisions of

three other circuits, is contrary to the decisions of this Court, and threatens to undermine the proper functioning of both the federal system for protecting individual employee rights and the RLA system for adjusting minor disputes arising out of claimed breaches of RLA collective bargaining agreements.

I. THE FIFTH CIRCUIT'S TITLE VII HOLDING DIRECTLY CONFLICTS WITH THE EXPRESS HOLDINGS OF THREE OTHER CIRCUITS.

The Fifth Circuit panel acknowledges that the decision below conflicts with a decision of the Second Circuit. In fact, the decision below conflicts with decisions of *three* other circuits. The Second, Eighth, and Tenth Circuits have all expressly rejected the proposition upon which the decision below rests: *viz.*, that the RLA's adjustment board system bars employees of RLA employers from bringing federal, statutory, employment-related causes of action in the federal courts.

A. In *Bates v. Long Island R. Co.*, 997 F.2d 1028 (2d Cir. 1993), the Second Circuit refused to dismiss the claims of railroad workers who alleged that their employer had discriminatorily discharged them on the basis of handicap, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The railroad-employer in *Bates* raised the very arguments that were raised below, *viz.*, that "the district court lacked subject matter jurisdiction" because the claims at issue "are 'minor disputes' under the RLA" that "must be resolved pursuant to the exclusive dispute resolution procedures outlined in § 3 of the RLA. 45 U.S.C. § 153." 997 F.2d at 1034. And, the railroad in *Bates* also urged that this Court's recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), establishes a policy in favor of arbitration that supports construing the RLA's mandatory arbitration scheme as barring RLA employees from bringing employment-related actions in court to vindicate federal, statutory rights. *Id.*

The Second Circuit unanimously rejected these arguments. That court reasoned, first, that the RLA grievance arbitration system is designed to adjudicate employee rights based on collective bargaining agreements, not cases where "an employee's statutory civil rights have been violated," so that " 'no inconsistency results from permitting [each class of rights] to be enforced in their respectively appropriate forums.' " 997 F.2d at 1034 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974)). And the Second Circuit added that "the rationale in *Gilmer* does not apply" to the RLA, since the Federal Arbitration Act (upon which *Gilmer* rests) "explicitly excludes contracts of railroad employment from its reach." 997 F.2d at 1034-35.[3]

B. The decision below also conflicts with the Tenth Circuit's decision in *McAlester v. United Air Lines*, 851 F.2d 1249 (10th Cir. 1988).

The employee in *McAlester* had brought a federal court action against his employer under 42 U.S.C. § 1981, alleging race discrimination in employment. *Id.* at 1252-56. Upholding the employee's right to bring such an action, the Tenth Circuit rejected the RLA employer's contention that the RLA's "minor dispute" system "precludes

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[3] *Bates* follows the earlier Second Circuit decision in *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33 (2d Cir. 1988), which upheld the right of a commuter railroad worker to challenge his employer's drug testing program through a federal court action under 42 U.S.C. § 1983. Like Amtrak in this case, the *Coppinger* employer argued that the railroad employee's challenge could only be pursued as an RLA "minor dispute." But, in the *Coppinger* Court's view, "[t]he Supreme Court [had] unanimously rejected this argument" in *Atchison, Topeka & Sante Fe R.R. v. Buell*, 480 U.S. 557 (1987) (rejecting argument that jurisdiction of RLA adjustment boards bars railroad workers from maintaining court actions for employment-related personal injuries under Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*). 861 F.2d at 36-37. The *Coppinger* Court understood this Court's decision in *Buell* to hold "that the RLA did not preempt other federal statutes that provide rights outside the scope of those covered by the RLA." 861 F.2d at 37.

the district court's subject matter jurisdiction over [the RLA employee's statutory] claim." *Id.* at 1252. While recognizing that the RLA's system "for the resolution of minor disputes is 'in at least some situations' exclusive," *id.* at 1254 (*quoting Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972)), the Tenth Circuit noted that this Court had only applied this policy of exclusive jurisdiction in cases where the underlying action "alleged breach of the collective bargaining agreement." *Id.* Resting on *Atchison, Topeka & Sante Fe R.R. v. Buell*, 480 U.S. 557 (1987)—as had the Second Circuit in *Coppinger*—the Tenth Circuit concluded that "this policy does not apply necessarily to independent rights or claims derived from *federal* statutory schemes." 851 F.2d at 1254. (emphasis in original).[4]

C. The decision below also conflicts with the Eighth Circuit's decision in *Norman v. Missouri Pacific Railroad*, 414 F.2d 73 (8th Cir. 1969), a case not mentioned in the decision below (although cited in the briefs).

Norman involved Title VII challenges to an alleged pattern of race discrimination and segregation in employment in the railroad industry. The railroad employer there advanced the same theory as Amtrak advanced below, *viz.*, that "the Railway Labor Act . . . place[s] exclusive jurisdiction over this type of complaint in . . . [the] National Adjustment Board." 414 F.2d 73. The *Norman* panel—which included Justice (then Circuit Judge) Blackmun—unanimously rejected this contention.

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[4] To be sure, the decision below sought to distinguish *McAlester* on the theory that "the defendant airline argued that the RLA preempted the employee's right to recover damages pursuant to 42 U.S.C., § 1981," while, in this case, "Amtrak does not argue that the RLA preempts Title VII or bars Hirras from recovering Title VII damages." App. 12a. This distinction does not go to the essential point. In both cases the employer asserted that the employee's statutory claim constituted a "minor dispute" under the RLA, and in both cases the employer asserted that this deprived the district court of subject matter jurisdiction. Of course, *McAlester* expressly rejected that employer argument and the panel below expressly adopted it.

Emphasizing that Title VII rights "are statutory rights, not contractual rights embodied in collective bargaining agreements," the Eighth Circuit concluded:

> We, therefore, do not think the plaintiffs are confined to their administrative remedies, which appear without further examination to be inadequate, under the Railway Labor Act. The enactment of Title VII provides a more extensive and broader ground for relief, specifically oriented towards the elimination of discriminatory employment practices based upon race, color, religion, sex or national origin. Title VII is cast in broad, all-inclusive terms setting up statutory rights against discrimination based *inter alia* upon race. The rights granted by this Title are enforceable by individuals in the District Court, provided, of course, proper [EEOC] administrative channels are utilized as set forth in the act. [414 F.2d at 83.]

II. THE PRIOR DECISIONS OF THIS COURT SUPPORT THE HOLDINGS OF THE SECOND, EIGHTH, AND TENTH CIRCUITS.

A. This Court's RLA Cases.

As noted in the decisions of the Second, Eighth, and Tenth Circuits, this Court has repeatedly affirmed that RLA employees have a full right of access to court when asserting federal, statutory, employment-related claims.

1. In *Atchison, Topeka & Santa Fe R.R. Co. v. Buell, supra*, a railroad employer presented essentially the same argument as Amtrak presented below; *viz.*, that a railroad employee's statutory cause of action—in *Buell*, a FELA action for damages for work-related injuries—should be dismissed because "the exclusive forum for any dispute arising out of workplace conditions is the RLA." 480 U.S. at 563. The *Buell* Court unanimously rejected this argument. The Court did note that, where a claim is "based squarely on an alleged breach of the collective-

bargaining agreement, . . . Congress had intended the RLA dispute resolution mechanism to be mandatory." 480 U.S. at 566 (*citing Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972)). But the Court emphasized that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." 480 U.S. at 565 (*quoting Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981)). Applying this principle, the Court upheld the right of RLA workers to sue in federal court, since in FELA "Congress has enacted . . . the statutory basis" for such a federal court action. 480 U.S. at 566.

2. *McKinney v. Missouri R. Co., supra*, 357 U.S. 265 (1958), is to the same effect. There the railroad employer asserted that a railroad employee could not maintain a federal court action to assert veteran reemployment rights—federal rights protected to all employees under the Universal Military Training and Service Act, 50 U.S.C. App. § 459(d)—because such rights could be asserted "before the National Railroad Adjustment Board." 357 U.S. at 268. This Court rejected that argument.

In reaching its conclusion, the *McKinney* Court emphasized—as the *Buell* Court would later emphasize—the difference between, on the one hand, those railroad workers' rights that arise from collective bargaining contracts (and that workers enjoy as members of a collective bargaining unit) and, on the other hand, those rights that Congress has established as federal, statutory, labor standards (and that each worker enjoys as an individual):

> The rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement . . . . Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed

> upon him in furtherance of a federal policy to protect those [employees] who have served in the Armed Forces. [357 U.S. at 268-269.]

3. As the Eighth Circuit noted in *Norman*, this Court's decision in *Railroad Trainmen v. Howard*, 343 U.S. 768 (1952) articulates the same distinction.

The *Howard* case involved an action by black railroad employees seeking *inter alia* to enjoin their employer from enforcing racially discriminatory provisions of a collective bargaining agreement. The employees' theory was that the negotiation of such provisions had violated the RLA itself. The district court dismissed the claims, holding "that the complaint raised questions which Congress by the Railway Labor Act had made subject to the exclusive jurisdiction of . . . the National Railroad Adjustment Board." 343 U.S. at 772.

In rejecting this theory of adjustment board exclusive jurisdiction, the *Howard* Court drew a distinction between rights derived from a collective bargaining agreement (exclusively to be determined in adjustment board proceedings) and rights derived from a federal statute (*not* within the exclusive jurisdiction of RLA adjustment boards):

> [C]olored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment . . . Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board . . . . This dispute involves the validity of the contract, not its meaning. . . . Our conclusion here is that the District Court has jurisdiction and power to issue necessary injunctive orders . . . . [343 U.S. at 774 (citations omitted).]

4. The Fifth Circuit virtually ignored these prior decisions of this Court. The panel below never mentioned

McKinney or *Howard*. And the panel distinguished *Buell* on the weakest of bases: *viz.*, that, unlike Title VII (which applies to employees generally), the statute at issue in *Buell*—the FELA—applies *solely to railroad workers*. App. 11a.

But the *Buell* decision did not limit its reasoning so narrowly. And, in any event, the statute in *McKinney* is, like Title VII, an employee protective statute of general application. Thus, this Court's decisions provide no predicate for the proposition that railroad workers may bring statutory actions in the courts *only* when statutes specifically authorize such actions *by railroad workers*.[5]

5. Against all this, the Fifth Circuit panel relied on this Court's opinion in *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711 (1945). *See* App. 4a (discussing statement in *Burley* (*id.* at 723) that "minor disputes" under the RLA include so-called "omitted case[s]," where "the claim is founded upon some incident of the employment relation . . . independent of those covered by the collective agreement, *e.g.*, claims on account of personal injuries"). In so relying on *Burley*, the Fifth Circuit, once again, adopts a position directly in conflict with all other courts of appeals that have examined the question.

a. Both the Seventh and Tenth Circuits have expressly recognized that the language in *Burley* upon which the Fifth Circuit relied is *dictum* that does *not* accurately state the scope of the RLA adjustment board's exclusive jurisdiction. In *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987), a unanimous panel rejected the argument that *Burley* deprived the courts of jurisdiction over all employee legal claims. As Judge Posner stated: "If that dictum

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[5] The district court—which also failed to mention *McKinney* or *Howard*—did no better in attempting to distinguish *Buell*. The district court simply noted that because the instant case "is not a suit for personal injuries under FELA . . . the rule in *Buell* does not apply." App. 20a.

[from *Burley*] were an accurate statement of the law, . . . all personal injury claims by railroad workers against their employers would be within the exclusive jurisdiction of the arbitration tribunals set up under the [RLA]—something no one believes." *Id.* at 814. And, in *Davies v. American Airlines*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 61 L.W. 3803 (1993), the Tenth Circuit stated that "*Burley*, to the extent that it can be read as holding that disputes not requiring [collective bargaining agreement] interpretation can be 'minor' for preemption purposes, appears to have been overruled by [later cases]." *Id.* at 467.

b. Such treatment of the *Burley* dictum by these other courts of appeals is hardly surprising, given *Burley*'s place within this Court's overall RLA jurisprudence:

First, *Burley*, in fact, involved a dispute over the proper application of collective bargaining agreement terms, and thus did not even pose the issue that was later squarely posed and discussed in *Howard*, *McKinney*, and *Buell*.

Second, the use in *Burley* of the term "omitted case," hardly suggests that *Burley* was referring to federal statutory claims. Rather, that term suggests a reference to claims based on understandings and agreements that are implicit in the collective bargaining agreement, although not expressly included in the agreement's terms. *See Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 155 (1969) (emphasis added) ("It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often *omitted* from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others."); *see also Conrail v. RLEA*, 491 U.S. 299, 311 (1989) (*quoting Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 161 (1966)). For all it appears, then, the *Burley* Court was

> interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board ["NRAB"] with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 153 First (i). "Minor disputes" include those where "the [employee's] claim is founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945); *see also Morales v. Southern Pacific Transp. Co.*, 894 F.2d 743, 745 (5th Cir.1990) (stating that claims "which grow out of the employment relationship can constitute 'minor disputes' under the Act, even when the claims do not arise directly from the collective bargaining agreement"). The NRAB's jurisdiction over minor disputes is exclusive.[4] *Andrews v. Louisville & N. Ry.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972). "[I]f there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor." *Railway Labor Executives Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 705 (7th Cir.1987).

B

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the plaintiff, as required by his employer, registered as a securities representative with the New York Stock Exchange. Gilmer's registration application provided that he agreed

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[4] **Major disputes, on the other hand, involve those that relate to the formation of collective bargaining agreements or efforts to secure them. *Burley*, 325 U.S. at 723, 65 S.Ct. at 1290. The terms "major" and "minor" obviously do not describe the gravity of the dispute.**

to arbitrate any controversy arising out of the employment relationship or termination of his employment. After Interstate terminated his employment, Gilmer brought suit alleging that Interstate had discharged him because of his age, in violation of the Age Discrimination in Employment Act ("ADEA").[5] The Supreme Court found that, pursuant to the Federal Arbitration Act ("FAA"),[6] Gilmer was required to arbitrate his ADEA claim:

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. . . "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; [instead,] it only submits to their resolution in an arbitral, rather than judicial, forum."

500 U.S. at ——, 111 S.Ct. at 1652 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985)).

The Court in *Gilmer* rejected several policy arguments against requiring arbitration of statutory discrimination claims. Gilmer first argued that because the Congress designed the ADEA to both address individual grievances and promote important social policies, compulsory arbitration of ADEA claims would be inconsistent with the purposes and statutory framework of the ADEA. The Court, however, did not find any inherent inconsistency

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[5] 29 U.S.C. § 621 *et seq.*

[6] 9 U.S.C. § 1 *et seq.* The FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

between those policies and the arbitration of ADEA claims: " '[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions.' " 500 U.S. at ——, 111 S.Ct. at 1653 (quoting *Mitsubishi*, 473 U.S. at 637, 105 S.Ct. at 3359).

Gilmer next contended that compulsory arbitration was inappropriate because it would deprive claimants of the judicial forum provided for by the ADEA. "Congress, however, did not explicitly preclude arbitration or other non-judicial resolution of claims, even in its recent amendments to the ADEA." *Id.* at 1653-54. Moreover, the Court stated that Gilmer's contention ignored the ADEA's flexible approach to the resolution of claims, "which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Id.* at 1654.

The Supreme Court in *Gilmer* also rejected as " 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes,' " *id.* (citation omitted), a host of challenges raised by Gilmer to the adequacy of arbitration proceedings. First, the Court refused to presume that arbitrators will be biased in favor of the employer. *Id.* The Court then rejected the contention that the limited discovery allowed in arbitration would make it difficult to prove discrimination. *Id.* at 1654-55. The Court also found that " 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Id.* at 1655 n. 4 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232, 107 S.Ct. 2332, 2340, 96 L.Ed.2d 185 (1987)).

Shortly after the Supreme Court decided *Gilmer*, we held that a stockbroker's Title VII claim was subject to

compulsory arbitration under the FAA:[7] "[W]e have little trouble concluding that Title VII claims can be subjected to compulsory arbitration. Any broad public policy arguments against such a conclusion were necessarily rejected by *Gilmer*." *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir.1991). Moreover, we found that *Gilmer* definitively rejected any argument against arbitration of discrimination claims that was based on a "mistrust of the arbitral process."[8] *Id.*

C

Turning now to the question whether Hirras's Title VII claim is subject to the RLA's arbitration provisions, we find that *Gilmer* and *Alford* compel the conclusion that Hirras's claim is subject to the arbitration provisions of the RLA.[9] The Supreme Court in *Gilmer* and this Court in *Alford* determined that there exist no federal or congressional policies prohibiting the submission of discrimination claims to arbitration. Indeed, § 118 of the 1991 Civil Rights Act encourages the use of "alternative means of dispute resolution," including arbitration, to resolve

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[7] The stockbroker had signed a securities registration application containing an arbitration provision similar to the one at issue in *Gilmer*.

[8] *See also Felt v. Atchison, T. & S.F. Ry.*, 831 F.Supp. 780 (C.D.Cal.1993) (finding that a religious discrimination claim brought under Title VII was subject to the compulsory arbitration provisions of the RLA); *Newton v. Southern Pacific Transp. Co.*, 1992 WL350245 (W.D.Tex. Sept. 8, 1992) (holding that a Title VII claim was subject to the compulsory arbitration provisions of the RLA).

[9] Although the parties occasionally have stated the issue as whether the RLA "preempts" Title VII, preemption is not the issue here. *See Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1447 (5th Cir.1992) (noting that "traditional preemption analysis does not apply in a conflict between two federal statutes"), *cert. denied*, —— U.S. ——, 113 S.Ct. 2929, 124 L.Ed.2d 679 (1993); *see also Watt v. Alaska*, 451 U.S. 259, 266-67, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981). Instead, we must determine how the interests underlying Title VII and the RLA can best be accommodated.

disputes arising under Title VII. *See* 42 U.S.C.A. § 2000e note (West Supp.1993). Moreover, the facts alleged by Hirras demonstrate that her claim is founded upon an incident of the employment relationship between her and Amtrak, thus making her claim a minor dispute under the RLA and subject to the exclusive jurisdiction of the NRAB. Because "Congress considered it essential to keep . . . 'minor' disputes within the [NRAB] and out of the courts," *Union P.R.R. v. Sheehan*, 439 U.S. 89, 94, 99 S.Ct. 399, 402, 58 L.Ed.2d 354 (1978) (per curiam), we believe that the interests of the RLA and Title VII are best served by requiring Hirras to arbitrate her Title VII claim under the procedures established by the RLA.

Hirras raises several arguments against requiring arbitration of her Title VII claim, all of which we find to be without merit. Hirras initially contends that *Gilmer* and *Alford* are factually distinguishable from this case, and thus should not control the outcome, because: (1) she did not waive her right to pursue statutory claims of discrimination in federal court by signing an arbitration agreement, as did the plaintiffs in *Gilmer* and *Alford*; (2) although the collective bargaining agreement between Amtrak and the Transportation Communications International Union, which represents Amtrak's employees, contains a provision prohibiting discrimination on the basis of race, color, religion, sex, national origin, or ancestry, the union cannot waive her right to bring a Title VII action in federal court; and (3) that the decisions in *Gilmer* and *Alford* rested upon pro-arbitration policy reflected in the FAA, while this case is not governed by the FAA.[10] Initially, we note that the duty to arbitrate here arises not from any agreement between the parties, but rather from the RLA itself. Moreover, because the specific statutory basis for arbitration of dis-

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[10] *See* 9 U.S.C. § 1 (stating that the FAA does not "apply to contracts of employment of . . . railroad employees").

putes between a railroad and its employees under the RLA is more compelling than the FAA's general applicability to the agreements at issue in *Gilmer* and *Alford*, the basis for concluding that Hirras' Title VII claim is subject to the RLA's arbitration procedures is stronger here.

Hirras next argues that the outcome of this case is controlled not by *Gilmer* and *Alford*, but rather by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), and its progeny.[11] The Supreme Court in *Gilmer*, however, pointed out four distinctions between those cases and *Gilmer*. First, the *Gardner-Denver* line of cases involved the issue whether arbitration of *contract-based* claims precluded subsequent judicial resolution of *statutory* claims, not the enforceability of an agreement to arbitrate statutory claims. Second, the labor arbitrators in those cases had limited authority under the applicable collective bargaining agreements and were not authorized by the employees to decide the statutory claims,[12] while Gilmer had agreed to arbitrate his discrimination claim. Third, because the employees were represented by their unions in the arbitration proceedings, an "important concern" in the *Gardner-Denver* line of cases was the tension between collective representation and individual statutory rights. Finally, those cases were not decided under the FAA, which reflects a liberal federal policy favoring arbitration agreements. *Gilmer*, 500 U.S. at ——, 111 S.Ct. at 1657.

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[11] *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); and *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984).

[12] In *Gardner-Denver*, the Court noted that a labor arbitrator has authority only to resolve questions of contractual rights and does not have the "general authority to invoke public laws that conflict with the bargain between the parties." 415 U.S. at 53-54, 94 S.Ct. at 1022-23.

We believe that the same four distinctions apply here. The *Gardner-Denver* line of cases is not controlling because: (1) they did not involve the issue whether the RLA mandates arbitration of a railroad employee's Title VII claim that arises out of the working conditions provided by the railroad; (2) "there is no statutory barrier to submitting [to the NRAB] questions involving the interpretation of statutes or case law," *Richmond, F. & P. R.R. v. Transportation Communications Int'l Union*, 973 F.2d 276, 279 (4th Cir.1992); (3) the RLA guarantees Hirras the right to present her claim, either with or without union involvement, to the NRAB;[13] and (4) the RLA, like the FAA, reflects a liberal federal policy favoring arbitration. Moreover, RLA arbitrators are just as competent as the New York Stock Exchange arbitrators in *Gilmer* and *Alford* to resolve statutory claims of discrimination. Accordingly, we find that this case more closely resembles the situation presented in *Gilmer* and, therefore, is governed by *Gilmer* rather than *Gardner-Denver*.

Hirras further relies on the Supreme Court's opinion in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), where the Court addressed the issue whether the possibility of pursuing a labor grievance under the RLA deprived an employee of the right to seek damages under the Federal Employers Liability Act ("FELA")[14] for personal injuries suffered

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[13] *See* 45 U.S.C. § 153 First (j); *Burley*, 325 U.S. at 736-38, 65 S.Ct. at 1296-97.

[14] 45 U.S.C. § 51 *et seq.* FELA specifically applies to railroads:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its

as a result of the negligence of a fellow employee or the employer railroad. The Court, rejecting the railroad's argument that FELA damages were unavailable if the injury was caused by a condition that could have been the subject of a grievance under the RLA, held that FELA claims did not have to be submitted to the NRAB pursuant to the RLA's arbitration procedures. *Id.* at 564, 566-67, 107 S.Ct. at 1415, 1416. *Buell*, however, is distinguishable from the present case for two reasons. First, "Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees." *Id.* at 561, 107 S.Ct. at 1413. Thus, the railroad's argument that a FELA action was barred whenever the employee's injury was caused by conduct subject to RLA arbitration ignored the purpose behind the FELA. Here, Amtrak does not argue that Hirras is barred from recovering Title III damages, but rather that her claim for damages may be pressed only before the NRAB. Second, Title VII, unlike the FELA, encourages parties to resolve employment discrimination disputes through arbitration. *See* 42 U.S.C. § 2000e note, (West Supp.1993). Accordingly, *Buell* is inapposite.

Finally, Hirras relies on *Bates v. Long Island R.R.*, 997 F.2d 1028, 1034 (2d Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 550, —— L.Ed.2d —— (1993), where the Second Circuit held that claims under the Rehabilitation Act of 1973 [15] are not required to be arbitrated under the RLA, even though the claims "may implicate . . . portions of [the relevant] collective bargaining agreement." The Second Circuit, distinguishing *Gilmer* as case decided under the FAA, stated that "there are certain instances when arbitration is inadequate to protect an

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negligence, in its cars, engines, appliances, machinery, tract, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

[15] 29 U.S.C. § 794.

employee's rights. . . . When an employee's civil rights have been violated, arbitration should not be the sole avenue of protection, unless Congress so specified." *Id.* (citing *Barrentine*, 450 U.S. at 734, 101 S.Ct. at 1442). In concluding that Rehabilitation Act claims need not be submitted to arbitration, the court also relied on the anti-arbitration policies articulated in *Gardner-Denver* line of cases.[16] However, as the Supreme Court has already rejected the *Gardner-Denver* anti-arbitration public policy arguments, we feel the Second Circuit erred in *Bates* in relying on them. Moreover, we find that Congress has specified in the RLA that statutory claims of discrimination arising out of the working conditions provided by employer are subject to the RLA's arbitration procedures. Accordingly, we do not find *Bates* pursuasive authority for the proposition that Hirras's Title VII claim need not be submitted to arbitration.[17]

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[16] The Second Circuit stated that barriers to arbitration of such claims include: (1) arbitrators resolve disputes according to the terms of the applicable collective bargaining agreement, not federal law, and (2) the fact-finding process in arbitration generally is not equivalent to judicial fact-finding because the Federal Rules of Evidence do not apply and little discovery occurs. 997 F.2d at 1035.

[17] Hirras relies on several other cases, all of which we find to be inapposite. For example, in *Britt*, 978 F.2d 1441, the employer contended that the National Labor Relations Act preempted ADEA claims. In *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1253 (10th Cir.1988), the defendant airline argued that the RLA preempted the employee's right to recover damages pursuant to 42 U.S.C. § 1981. As noted above, Amtrak does not argue that the RLA preempts Title VII or bars Hirras from recovering Title VII damages. In *Claps v. Moliterno Stone Sales, Inc.*, 819 F.Supp. 141 (D.Conn.1993), the district court, based on the policy arguments articulated in *Gardner-Denver* against arbitration of statutory claims, rejected the employer's argument that it was entitled to summary judgment on the plaintiff's Title VII claims because the plaintiff had not exhausted the grievance procedures available under the RLA. Because we have already held that the Supreme Court in *Gilmer* rejected any broad public policy arguments against requiring Title VII claims to be arbitrated, *see Alford*, 939 F.2d at

III

State law claims that involve minor disputes are preempted by the RLA. *Morales*, 894 F.2d at 746. A state law claim involves a minor dispute when the claim is " 'inextricably intertwined' with the terms and conditions of employment under the collective bargaining agreement"—that is, when the court must interpret the terms and conditions of the agreement to properly resolve the claim. *Id.* at 745. Thus, state law claims that "grow out of the employment relationship can constitute 'minor disputes' under the [RLA], even when the claims do not arise directly from the collective bargaining agreement itself." *Id.*

We find that Hirras's intentional infliction of emotional distress claim grew out of the employment relationship and therefore is inextricably intertwined with the terms and conditions of her employment.[18] *See Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698 (8th Cir.1992) (concluding that the RLA preempted an intentional infliction of emotional distress claim). To properly adjudicate Hirras's claim, the district court would have to construe the collective bargaining agreement to determine what

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230, we do not find *Claps* persuasive. *See also Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (requiring arbitration of claim arising under the Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (requiring arbitration of claims arising under the Securities Exchange Act of 1934 and the civil provisions of RICO); *Mitsubishi Motors*, 473 U.S. 614, 105 S.Ct. 3346 (requiring arbitration of claim arising under the Sherman Act).

[18] Hinas alleges that a co-worker harassed her; that Amtrak supervisors tolerated the harassment and did nothing to stop it; that Amtrak "maintain[ed] a policy, practice, custom or usage of discriminating against [her] because of her sex . . . with respect to compensation, terms, conditions and privileges of employment and in wages that deprive[d her] of equal employment opportunities"; and that the harassment "became so unbearable that [she] was forced to take a leave of absence . . . [and] is unable to return to work."

actions Amtrak was required to take in response to Hirras's complaints that she was being harassed. *See Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989). Moreover, if Hirras was successful on her claim, "the district court would have to determine [Hirras's] substantive rights under the collective bargaining agreements in order to fashion an appropriate remedy." [19] *Morales*, 894 F.2d at 746. Accordingly, we conclude that the district court properly dismissed the intentional infliction claim for lack of subject matter jurisdiction because the claim is preempted by the RLA.

IV

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[19] As the district court correctly found, Hirras's claim and desired remedies implicate provisions in the collective bargaining agreement relating to "promotion, assignments and displacements, seniority, sick leave, leave of absence, return from leave of absence or temporary assignment, and fitness for duty physical examinations."

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. TEXAS
SAN ANTONIO DIVISION

Civ. A. No. SA-90-CA-1264

SANDY DIANA HIRRAS,
Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
d/b/a AMTRAK,
Defendant.

Nov. 17, 1992

ORDER

WALTER S. SMITH, Jr., District Judge.

Came on to be considered the Defendant's Motion to Dismiss or for Summary Judgment. Plaintiff has filed a response to this Motion. Defendant has replied to this Response.

I. *Background*

This is an action under Title VII of the Civil Rights Act of 1964 in which the Plaintiff, Sandy Diana Hirras ("Hirras"), claims that Defendant, National Railroad Passenger Corporation ("Amtrak"), discriminated against her because of her sex and sexually harassed her by tolerating a hostile work environment at the San Antonio station where she worked for less than five months as a ticket clerk.

Plaintiff claims that during her employment with Amtrak, she started receiving frightening telephone calls, threatening her with injury or death if she did not quit. She states that these calls were obscene and sexually derogatory. These calls, moreover, were received by her at her unlisted home number. She states that she received similar calls on restricted Amtrak telephone lines while at work. She asserts that she even received these calls after she went on disability while at her sister's house in Wisconsin.

In addition to the telephone calls, Plaintiff alleges that similarly obscene notes were placed on her car, threatening her with death or serious injury if she did not quit (attached as Exhibit 2 to her Response). Derogatory comments were also spray painted on the baggage room door at Amtrak telling her in sexual terms to quit Amtrak (attached as Exhibit 3 are photos).

Finally, Plaintiff asserts that employees of Amtrak exposed her to sexual statements and innuendos by showing her the pinups in the mechanic's office and telling her that it was the "Amtrak Gallery" and that she would have to pose nude for it.

Defendant points out that while Plaintiff was in Austin training, an Amtrak passenger was arrested in San Antonio for allegedly transporting drugs aboard the train. It was only after this incident that various Amtrak employees, male and female, began to receive threatening and harassing phone calls. The Defendant alleges that these calls were apparently related to the recent drug bust. As time went on, various Amtrak employees continued to receive these calls, both at home and work. Four different police enforcement groups were called in to investigate these incidents. Amtrak, moreover, conducted a thorough investigation of these telephone calls. Amtrak District Supervisor Neil Wright interviewed numerous employees and even provided Plaintiff with a Southwestern Bell Telephone "Customer Line Identifica-

tion" form so that her home calls could be traced. Plaintiff cannot remember whether she requested such a phone tap. The identity of the callers has not been identified. Mr. Wright similarly investigated the note left on Plaintiff's car, and the graffiti painted on the baggage door. No suspects have been identified.

II. *Motion to Dismiss*

A motion to dismiss under Rules 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum and Chemical Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir.1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.1986). "The question therefore is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Wright and Miller, *Federal Practice and Procedure*, Section 1357 at 601.

III. *Discussion*

Defendant argues that because Plaintiff's Title VII claim is subject to mandatory arbitration under the Railway Labor Act, this Court lacks subject matter jurisdiction over the present action. Plaintiff argues that the mandatory dispute resolution provisions of the Railway Labor Act do not apply to the statutory provisions of Title VII of the Civil Rights Act. This Court agrees with the De-

fendant, and grants the motion to dismiss because of lack of subject matter jurisdiction.

In *Gilmer v. Interstate/Johnson Lane Corp.*, —— U.S. ——, ——, 111 S.Ct. 1647, 1650, 114 L.Ed.2d 26 (1991), the Supreme Court held that a claim under the Age Discrimination in Employment Act of 1967 ("ADEA") "can be subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." Similarly, in *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir.1991), the Fifth Circuit, citing *Gilmer*, held that "Title VII claims, like ADEA claims, are subject to arbitration under the Federal Arbitration Act ("FAA")." The arbitration clause in *Alford* was located in a stockbroker's contract with the securities exchange. Because of the unambiguous pronouncements from the Supreme Court and the Fifth Circuit, the sole inquiry for this Court is whether the Railway Labor Act ("RLA") compels arbitration of this Title VII claim. Neither *Gilmer* nor *Alford* specifically dealt with this issue.

As the Supreme Court has recognized repeatedly, the RLA requires that all railroad employee disputes arising from the interpretation or application of collective bargaining agreements, so called "minor disputes," be resolved through mandatory arbitration. 45 U.S.C. §§ 151a (5), 152 (First), & 153. The RLA vests Board of Adjustment with exclusive jurisdiction over the resolution of all such disputes. *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93, 99 S.Ct. 399, 402, 58 L.Ed.2d 354 (1978).

The Supreme Court has liberally construed the broad scope of exclusive jurisdiction accorded RLA adjustment boards, holding that its mandatory arbitration provisions cover not only disputes arising under a collective bargaining agreement, but also those that are *independent* of the agreement whenever "the claim is founded upon some incident of the employment relation." *Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 723, 65 S.Ct.

1282, 1290, 89 L.Ed. 1886 (1945). Accordingly, virtually any dispute between a railroad and a railroad worker that arises out of the employment relationship is subject to mandatory arbitration, regardless of whether it involves the collective agreement or is independent of that agreement. For example, in *Morales v. Southern Pac. Transp. Co.*, 894 F.2d 743, 745 (5th Cir.1990), the Fifth Circuit held

> State law claims which grow out of the employment relationship can constitute "minor disputes" under the Act, even when the claims do not arise from the collective bargaining agreement itself. [citation omitted] If the state law claim is "inextricably intertwined" with the terms and conditions of employment under the collective bargaining agreement, the claim constitutes a "minor dispute" under the Act and is subject to the grievance procedures contained in the bargaining agreement. [citation omitted]

In the *Morales* case, the Court found that the state law claims could not be properly adjudicated without considering the terms and conditions of the collective bargaining agreement.

The Plaintiffs cite *Atchison, Topeka & Santa Fe R.R. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), for the proposition that the RLA does not preclude a suit for damages under Title VII. *Buell* dealt with a personal injury suit under the Federal Employers' Liability Act ("FELA"). The Supreme Court held that the mandatory arbitration provisions of the RLA did not deprive the railroad employee of the right to bring a FELA action for damages. The Court reasoned that Congress, in enacting the RLA twenty years after FELA, could not have "intended that a worker suffering a disabling injury would be denied recovery under FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Buell* at 565, 107 S.Ct. at 1415. The Supreme

Court was careful in tailoring its ruling to the narrow fact situation presented. The Court noted that "the RLA remedy for the resolution of minor disputes is 'in at least some situations' exclusive." *Id.* (citing *Andrews v. Louisville R.R.*, 406 U.S. 320, 325, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972)).

Whether a suit under Title VII is subject to the mandatory arbitration provisions of the RLA is an issue of first impression in this Circuit. This Court is of the opinion that given the liberal interpretation of the arbitration provisions of the RLA, and the nature of the injury complained of by the Plaintiff, this suit involves a "minor dispute" which is subject to mandatory arbitration under the RLA. This is not a suit for personal injuries under FELA, thus the rule in *Buell* does not apply. Therefore, this Court adopts the reasoning set forth by Magistrate Judge O'Connor in *Newton v. Southern Pac. Transp. Co.*, SA-91-CA-1024, 1992 WL 354186 (September 29, 1992), and holds that Plaintiff's claims should be dismissed.

IV. *Conclusion*

Based upon the foregoing, it is clear that Plaintiff's claim should be dismissed without prejudice. Accordingly, it is

ORDERED that Defendant's Motion to Dismiss is GRANTED. It is further

ORDERED that this case is DISMISSED WITHOUT PREJUDICE. It is further

ORDERED that all pending motions not previously ruled on are DENIED as moot.

APPENDIX C

[Oct. 11, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-90-CA-1264

SANDY DIANA HIRRAS,
Plaintiff

VS.

NATIONAL RAILROAD PASSENGER CORPORATION,
d/b/a AMTRAK,
Defendant

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S STATE TORT LAW CLAIMS

ORDER DENYING AS MOOT DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Upon review, the Court finds that defendant's Motion to Dismiss plaintiff's state tort law claims should be GRANTED, and that defendant's motion for Partial Summary Judgment should be DENIED AS MOOT.

I. *Background*

Defendant National Railroad Passenger Corporation ("Amtrak") is a for-profit corporation created by the Rail Passenger Service Act of 1970 to run a national rail passenger system. By statute, Amtrak is considered a common railway carrier subject to the Railway Labor Act ("RLA"). 45 U.S.C. §§ 151, 546(b).

Plaintiff Sandy Hirras is employed by Amtrak as a Ticket Clerk in San Antonio, Texas. The terms and conditions of employment for all Amtrak Ticket Clerks are governed by the collective bargaining agreement ("CBA") between Amtrak and the Transportation Communications International Union.

In this suit, plaintiff seeks declaratory, injunctive and monetary relief for alleged under Title VII for sexual harassment. Plaintiff has also asserted tort claims for intentional and negligent infliction of emotional distress. Amtrak has moved to dismiss the pendent tort claims on two grounds. First, defendant argues that the tort claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq*. Second, defendant argues that no cause of action for negligent infliction of emotional distress within the employer-employee relationship has been recognized by the Texas courts. The Court agrees with both of these arguments and, therefore, finds that plaintiff's state tort claims must be dismissed.

II. *Negligent Infliction of Emotional Distress Claims*

"Under Texas law, no cause of action for negligent infliction of emotional distress has been recognized in the area of employer-employee relations." *Soto v. City of Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991); *Fiorenza v. First City Bank-Cent.*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). Accordingly, plaintiff's claim for negligent infliction of emotional distress must be dismissed.

III. *Preemption by the Railway Labor Act*

The next question is whether plaintiff's claim for intentional infliction of emotional distress are preempted by the RLA.

> The Railway Labor Act provides a comprehensive scheme of mandatory procedures for the prompt and orderly settlement of "major disputes" and "minor

> disputes" between carriers, unions, and employees. "Major disputes" relate primarily to the formation of collective bargaining agreements, while "minor disputes" mainly involve the interpretation of collective bargaining agreements and the resolution of lesser disputes related to the employment relationship. . . .
>
> State law claims which grow out of the employment relationship can constitute "minor disputes" under the Act, even when the claims do not arise directly from the collective bargaining agreement itself. *See, e.g., Leu v. Norfolk & W. Ry. Co.*, 820 F.2d 825, 829-30 (7th Cir. 1987) (claim for medical expenses). If the state law claim is "inextricably intertwined" with the terms and conditions of employment under the collective bargaining agreement, the claim constitutes a "minor dispute" under the Act and is subject to the grievance procedures contained in the bargaining agreement.

Morales v. Southern Pac. Transp. Co., 894 F.2d 743, 745 (5th Cir. 1990).

In *Morales*, the plaintiffs were former employees who, at the time they were laid off, gave up their seniority rights in exchange for a cash payment. When the defendant-company recalled some of the workers it had previously laid off, but not the plaintiffs, the plaintiffs alleged that they had been fraudulently induced to give up their seniority rights. The court found that these claims were preempted by the RLA because the plaintiffs' "state law claims cannot be properly adjudicated without considering the terms and conditions of their employment under the collective bargaining agreements." *Id.* at 745-46.

In the instant case, plaintiff complains that she was harassed, that her supervisors failed to provide her with a non-hostile workplace, that she was forced to take a leave of absence because of the harassment, and that her medical condition prevents her from returning to work.

These claims are all related to plaintiff's employment relationship with Amtrak. Evaluating these claims will require the Court to refer to and to interpret the terms of the CBA provisions governing promotion, assignments and displacements, seniority, sick leave, leave of absence, return from leave of absence or temporary assignment, and fitness for duty physical examinations.

Accordingly, plaintiff's claim for intentional infliction of emotional distress is preempted by the RLA and must be dismissed.

IV. *Conclusion*

For the foregoing reasons, the Court finds that defendant's Motion to Dismiss should be GRANTED, and that defendant's Motion for Partial Summary Judgment should be DENIED AS MOOT.

IT IS SO ORDERED.

SIGNED this 11 day of October 1991.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA90CA1264

SANDY DIANA HIRRAS,
Plaintiff

VS.

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK,
Defendant

COMPLAINT

I.

This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. Jurisdiction of this Court is invoked pursuant to 42 U.S.C. Sec. 2000-5(f) and 28 U.S.C. Sec. 1343(4). Declaratory relief is sought under 28 U.S.C. Sec. 2201 and 2202. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 42 U.S.C. Sec. 2000e et seq., providing for injunctive relief against sex (female) discrimination and harassment in employment.

II.

(42 U.S.C. Sec. 2000e et seq. Claim)

All conditions precedent to jurisdiction under 42 U.S.C. Sec. 2000e et seq. have occurred or been com-

plied with, to wit: A charge of employment discrimination was filed with the Equal Employment Opportunity Commission within 180 days of the commission of the unfair employment practice; a Notification of Right to Sue was received from the Equal Employment Opportunity Commission on August 8, 1990; this complaint has been filed within 90 days of receipt of the Notification of Right to Sue.

III.

Plaintiff is a female citizen of the United States, State of Texas, and resides in Bexar County, Texas within the Western District.

IV.

The unlawful employment practices alleged herein were committed within the State of Texas, county of Bexar. City of San Antonio.

V.

Defendant, National Railroad Passenger Corp. d/b/a Amtrak is a National corporation, incorporated under the laws of the District of Columbia, authorized to do business in the State of Texas, with offices within the Western District of Texas.

VI.

Defendant is an employer engaged in an industry that affects commerce and employs more than fifteen (15) employees.

VII.

This is a proceeding for a declaratory judgment as to Plaintiff's rights and for a permanent injunction, restraining Defendant from maintaining a policy, practice, custom or usage of discriminating against Plaintiff because of her sex (female) with respect to compensation, terms, conditions and privileges of employment and in wages that deprive Plaintiff of equal employment opportunities and otherwise adversely affect her status as employee because of sex (female). This complaint also seeks restitu-

tion to Plaintiff of all rights, privileges, benefits and income that would have been received by her but for the Defendant's unlawful and discriminatory practices.

Further, Plaintiff seeks damages for the emotional duress that resulted as a direct result of the Defendant's discrimination and actions.

VIII.

Plaintiff was first employed by the Defendant on February 9, 1990, as a Ticket Clerk. Immediately, Plaintiff began to be harassed because she was a woman. She was insulted, verbally asasulted and generally treated in a discriminating and illegal manner. She informed her supervisors but nothing was done. The supervisor failed to prevent the sexual harassment and did not provide a non-hostile environment.

The sexual derogatory behavior took the form of verbal abuse, abusive telephone calls, abusive notes and abusive paintings.

Plaintiff was subjected to a hostile work environment that existed even after Plaintiff reported the actions to her supervisor, Neil Wright. Plaintiff's psychological well being was affected by the conduct that is the basis for the Complaint. The actions of the Defendant were such and the environment was so hostile that any reasonable person (female) as confronted would be affected. Defendant has violated the provisions of 42 U.S.C. 2000e et seq. by sexually harassing the Plaintiff and failing to eliminate a hostile work environment based on sex (female).

IX.

The harassment became so unbearable that Plaintiff was forced to take leave of absence beginning June 11, 1989. Plaintiff's medical condition is such that she is unable to return to work at that place and with the agents of Defendant. Defendant has failed to place her

in a non-hostile work environment results in continued damage to the Plaintiff.

X.

Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged, and this suit for injunctive relief is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from Defendant's policy, practice, custom, and usage as set forth herein until and unless enjoined by the Court.

XI.

(Negligent Infliction of Emotional Duress)

Plaintiff further alleges that the Defendant, National Railroad Passenger Corporation d/b/a Amtrak caused, individually and by and through its agents, George Aldrete, Roy Miller, James Southwicke and Roland Palacios' actions, the negligent infliction of emotional duress to Plaintiff. Said action resulted in Plaintiff being humiliated, causing loss of self-esteem, loss of sleep, depression, worry and anxiety. Plaintiff further sustained emotional duress in the loss and reduction of her benefits when she was separated from her employment with Defendant. Further, Plaintiff sustained emotional duress because of loss of livelihood, prestige and employment with Defendant, which further resulted in loss of self-esteem, sleep, worry, depression, and anxiety. Plaintiff has further sustained damages of reduced earning capacity because of the actions of the Defendant's agents.

Plaintiff seeks exemplary damages from Defendant for the willful acts by it, individually or through its agents, which led to her emotional duress because of the Defendant's malice.

Plaintiff seeks damages in the amount to compensate her for the injuries she has sustained, including prejudgment interest. Plaintiff sustained temporary, as well as

permanent, injuries from the emotional duress caused by Defendant by her treatment. Plaintiff further seeks damages for both physical and mental pain and suffering due to the negligent infliction of emotional duress in the past and in the future.

XII.

(Intentional Infliction of Emotional Duress)

Plaintiff alleges that as a result of the actions of Defendant, by and through is agents and employees, she has suffered severe emotional duress. Defendant, by and through its agents, intentionally inflicted severe emotional duress upon the Plaintiff; or alternatively, Defendant was certain or substantially certain that such duress would result to Plaintiff by the actions of the Defendant.

Defendant's conduct toward the Plaintiff was extreme, outrageous and intolerable. As a result of Defendant's actions, Plaintiff has suffered severe emotional duress.

Plaintiff has suffered emotional duress, including but not limited to, depression, worry, loss of sleep, anxiety, loss of self-esteem, humiliation, embarassment, and fear for her safety as a direct cause of Defendant's actions. Defendant's actions are the proximate cause of Plaintiff's injuries.

Plaintiff seeks damages for both physical and mental pain and for suffering due to the intentional infliction of emotional duress in the past, as well as the future.

XIII.

The actions of Defendant and its agents were willful and maliciously done with the intent to harm or injure the Plaintiff or with reckless disregard of whether it would harm or injure Plaintiff. Plaintiff seeks exemplary damages to punish the Defendant for its actions and the actions of its agents.

XIV.

Plaintiff hereby demands a jury.

WHEREFORE, Plaintiff prays this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and on such hearing to this Court, that it:

1. Enter a declaratory judgment that the practices complained of herein are unlawful and violative of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e et seq.);

2. Permanently enjoin Defendant, its agents, successors, officers, employees, attorneys and those acting in concert with it or them from engaging in each of the unlawful practices, policies, customs, and usages set forth herein, and from continuing any and all other practices shown to be in violation of applicable law;

3. Order modification or elimination of practices, policies, customs, and usages set forth herein, and all other such practices shown to be in violation of applicable law so they do not discriminate on the basis of sex (female).

4. Immediately assign Plaintiff to the job that she would now be occupying but for the discriminatory practices of Defendant, and adjust the wage rates, salaries, bonuses, and benefits for Plaintiff to that level which she would be enjoying but for the discriminatory practices of Defendant;

5. Compensate and make whole Plaintiff for all earnings, wages, and other benefits she would have received but for the discriminatory practices of Defendant;

6. Grant Plaintiff judgment against the Defendant for compensatory damages including, but not limited to, lost wages, bonuses, benefits and promotions;

7. Judgment against Defendant for emotional duress, both intentional and negligent, which includes but not

limited to, depression, worry, loss of sleep, anxiety, loss of self-esteem, humiliation, embarassment, and fear for Plaintiff's safety;

8. Judgment of damages against the Defendant for punitive damages in the amount to prevent the Defendant from engaging in such activity in the future.

9. Award Plaintiff the costs and disbursements of this action, and expenses herein;

10. Award Plaintiff reasonable attorney's fees; and

11. Grant Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX E

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have

more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance

with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowances in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award

with respect to any dispute submitted to the First Division

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the ap-

propriate division of the Adjustment Board with a full statement of the fact and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employees the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and

except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court, the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part or remanded

to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice

chairman; *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for

service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated

by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board

may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

(May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189; June 20, 1966, Pub.L. 89-456, §§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub.L. 91-234, §§ 1-6, 84 Stat. 199, 200.)

(2)

No. 93-1584

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SANDY DIANA HIRRAS,

Petitioner,

versus

NATIONAL RAILROAD PASSENGER CORPORATION, d/b/a AMTRAK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly hold that Petitioner's claim of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* must be submitted to an adjustment board pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*?

2. Did the court of appeals correctly hold that Petitioner's state law claim for intentional infliction of emotional distress is preempted by the Railway Labor Act because it would require the court to construe the collective bargaining agreement between Respondent and Petitioner's union?

RULE 29.1 LIST

The National Railroad Passenger Corporation has no parent companies or subsidiaries, other than wholly owned subsidiaries.

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IN THE

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SANDY DIANA HIRRAS,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent National Railroad Passenger Corporation ("Amtrak") respectfully submits that this case does not present any issue suitable for consideration by this Court and that the Petition for a Writ of Certiorari should be denied. As discussed in this brief, there is no conflict among the courts of appeals, and the decision of the Court of Appeals for the Fifth Circuit correctly applied the governing statutes and controlling Supreme Court precedent in affirming the dismissal of Petitioner's lawsuit.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas are set forth in Appendices A through C to the petition in this case. All ref-

erences in this brief to those decisions are to the appendices to the petition.

STATUTORY PROVISIONS INVOLVED

The petition, while setting forth selected excerpts from Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, fails to reference § 118 of the Civil Rights Act of 1991, which encourages the arbitration of Title VII claims. Section 118 provides as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, 1991 U.S.C.C.A.N. (105 Stat.) 1071, 1081.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts [1]

Petitioner ("Hirras") was hired by Amtrak on February 20, 1989, as a ticket clerk in San Antonio, Texas. 2R 251 ¶ 2. The terms and conditions of her employment were governed by a collective bargaining agreement. 2R 252 ¶ 4. The collective agreement specifically prohibits Amtrak from "discriminat[ing] against any employee with regard to race, color, religion, *sex*, national origin, age, handicap, or sex orientation." Summary

[1] Although Amtrak filed a motion for summary judgment based on undisputed facts, Petitioner's statement of facts is taken from the bare allegations in her complaint. The undisputed summary judgment evidence, on which Amtrak's statement of facts is based, presents a markedly different scenario than is contained in the complaint.

Judgm. App. Tab 23 Exh. A, unnumbered second page (emphasis added).

Shortly after Hirras began her employment, an Amtrak passenger was arrested in San Antonio for allegedly transporting drugs aboard the train. 2R 252 ¶ 5. Thereafter, employees in the San Antonio ticket office—both male and female—began receiving threatening and harassing anonymous telephone calls. 2R 252-53 ¶¶ 7-11. Hirras also reported to her supervisor an anonymous, vulgar note on her car windshield and obscene, spray-painted graffiti on the baggage room door at the San Antonio station. 2R 254-55 ¶¶ 19, 24. Amtrak conducted a thorough investigation of the calls, the note, and the graffiti, including calling in various law enforcement agencies to conduct their own investigation, but no suspects were identified. 2R 253-56 ¶¶ 12-18, 21-23, 26-29.

During her brief period of active employment, Hirras also reported that a co-worker (Jimmy Southwicke) had made two lewd comments to her. 2R 260 ¶ 45. Based on this report, Amtrak initiated disciplinary proceedings against Southwicke in accordance with the collective bargaining agreement. 2R 260-61 ¶ 48. However, at Hirras's request, the charges against Southwicke were dropped. 2R 261 ¶ 49.[2]

On June 11, 1989, Hirras took a medical leave of absence, allegedly as a result of the incidents at work. 3R 724 ¶ IX. Hirras then filed a charge of sex discrimination with the Equal Employment Opportunity Commission. She thereafter brought suit under Title VII for sexual harassment and under state law for negligent and intentional infliction of emotional distress based on the alleged harassment.

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[2] Hirras also claimed that three other co-workers were rude to her. 2R 258-59 ¶¶ 37-39. Although none of this alleged conduct was sexual in nature, Amtrak counseled the three co-workers concerning their rudeness, and no further incidents were reported. 2R 260 ¶¶ 46, 47.

B. Statement of Proceedings

On October 11, 1991, the United States District Court (Judge Edward C. Prado) granted Amtrak's motion to dismiss Hirras's state law claims. The court held that (1) the negligent infliction claim must be dismissed because Texas does not recognize that cause of action and (2) the intentional infliction claim must be dismissed because it is preempted by the RLA. Petition 21a-24a.

Amtrak subsequently moved to dismiss the Title VII claim, or, alternatively, for summary judgment on the merits. On November 13, 1992, the district court (Judge Walter S. Smith, Jr.) granted the motion to dismiss on the ground that Hirras's Title VII claim must be arbitrated under the RLA. Petition 15a-20a. The court did not reach the merits of Amtrak's motion for summary judgment, but instead denied it as "moot." Petition 20a.

On January 7, 1994, the Fifth Circuit (Chief Judge Politz and Judges Reavely and Emilio Garza) affirmed the district court's decisions. The court first noted that a claim must be submitted to arbitration under the RLA if it " 'is founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective agreement.' " Petition 4a (*quoting Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945)). The court also acknowledged that " 'there is no statutory barrier to submitting [to the National Railroad Adjustment Board ("NRAB")] questions involving the interpretation of statutes or case law.' " Petition 10a (*quoting Richmond, F. & P. R.R. v. Transportation Communications Int'l Union*, 973 F.2d 276, 279 (4th Cir. 1992)). Then, applying this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) to the facts of this case, the court concluded that Hirras's Title VII claim of sexual harassment must be submitted to an RLA arbitrator. In reaching this conclusion, the court emphasized that "§ 118 of the 1991 Civil Rights Act encourages the use of 'alternative means of dispute

resolution,' including arbitration, to resolve disputes arising under Title VII." Petition 7a-8a.[3]

The Fifth Circuit also affirmed the district court's ruling that Hirras's state intentional infliction claim is preempted by the RLA because "[t]o properly adjudicate Hirras's claim, the district court would have to construe the collective bargaining agreement to determine what actions Amtrak was required to take in response to Hirras's complaints that she was being harassed." Petition 13a-14a. The court further concluded that "Hirras's claim and desired remedies implicate provisions in the collective bargaining agreement relating to 'promotion, assignments and displacements, seniority, sick leave, leave of absence, return from leave of absence or temporary assignment, and fitness for duty physical examinations.' " Petition 14a n.19 (*quoting* district court's decision of October 11, 1991 [Petition 24a]).

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[3] Amtrak also asserted its summary judgment motion on the merits as an alternative ground for affirming the district court's judgment; however, the Fifth Circuit did not address that argument.

REASONS FOR DENYING THE WRIT[4]

Although Hirras's petition questions the Fifth Circuit's judgment affirming dismissal of both her Title VII and intentional infliction claims, she has briefed only the Title VII question. As we show in this brief, none of the arguments presented by Hirras warrant review by this Court. First, there is no conflict in the circuits. Second, the Fifth Circuit's decision is consistent with Supreme Court precedent setting the parameters of RLA arbitration and the strong federal policy favoring arbitration of statutory claims. Third, rather than threatening to disrupt the RLA grievance-arbitration system, the Fifth Circuit's decision fairly accommodates the RLA and Title VII and serves the purposes of both statutes. Fourth, even if the state court decision in *Hawaiian Airlines* correctly stated the test for RLA preemption, the Fifth Circuit's decision in this case properly dismissed Hirras's intentional infliction claim since that claim cannot be decided without construing the collective agreement.

I. THERE IS NO CONFLICT IN THE CIRCUITS.

In arguing that a conflict in the circuits exists sufficient to warrant Supreme Court review, Hirras cites three circuit court opinions. None of these opinions creates a conflict or a reason to supplant the lower courts'

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[4] Amtrak is aware that this Court has granted the petition for a writ of certiorari in *Norris v. Hawaiian Airlines*, 842 P.2d 634 (Haw. 1992), *cert. granted in part*, 114 S. Ct. 908 (U.S. Jan. 21, 1994) (No. 92-2058). Although *Hawaiian Airlines* does not involve the forum selection issue presented in this case, and, as noted *infra*, the holding in this case would stand even if the Hawaii Supreme Court's decision correctly stated the law, Amtrak acknowledges that this Court's decision in *Hawaiian Airlines* could have some impact on this case because the arguments of the parties address the scope of the grievance-arbitration procedure created by the RLA. Should the Court not rule on Hirras's petition before a decision is issued in *Hawaiian Airlines*, Amtrak will promptly file a supplemental brief if the Court's *Hawaiian Airlines* decision is relevant to Hirras's petition.

development of the *Gilmer* principle in the many factual and statutory contexts in which it may arise.

A. In *Bates v. Long Island R.R.*, 997 F.2d 1028 (2d Cir.), *cert. denied*, 114 S. Ct. 550 (1993), the plaintiffs were suing under an entirely different statute: § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accommodation of the RLA with other employment legislation cannot be undertaken categorically, but should be considered on a statute by statute basis. For example, unlike § 504 of the Rehabilitation Act, § 118 of the Civil Rights Act of 1991 specifically encourages arbitration of discrimination claims. Moreover, § 504 and Title VII provide different remedies, procedures and rights. *See* 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved . . . under section [504]."); *Milbert v. Koop*, 830 F.2d 354, 356 (D.C. Cir. 1987) ("By way of contrast [to Title VII], section 504 incorporates Title VI—not Title VII—procedures.").

Further, although the *Bates* decision contains a discussion of *Gilmer*, the factual context is inapposite because there is no indication in the briefs or opinion that the parties had submitted the *statutory* claims to arbitration. The court of appeals' opinion in *Bates* describes a situation where arbitration had occurred, but the statutory claims apparently had not been considered. The *Bates*' court's discussion of *Gilmer* forum selection is *dictum* because in the Second Circuit neither party argued that the statutory claims had been or must be arbitrated. In contrast, in the *Hirras* case, arbitration of the statutory claim was the controlling question, and the collective bargaining agreement itself anticipated the submission of such issues. Indeed, in its brief to the Second Circuit (pp. 24, 25), the railroad in *Bates* argued that "[t]he instant case is set squarely on the collective bargaining agreement" and plaintiffs have "disingenuously characterize[d] their claims as handicap discrimination actions

under Section 504 of the Rehabilitation Act." Unlike the arguments in *Bates*, the Fifth Circuit's decision in this case was based solely on forum selection principles: "Amtrak does not argue that Hirras is barred from recovering Title [VII] damages, but rather that her claim for damages may be pressed only before the NRAB." Petition 11a.

For these reasons, *Bates* does not present " 'a real and embarrassing conflict of opinion and authority between the circuit courts of appeal' " that would warrant granting a writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (*quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

B. Hirras also purports to find a conflict with the decisions in *McAlester v. United Airlines*, 851 F.2d 1249 (10th Cir. 1988) and *Norman v. Missouri Pac. R.R.*, 414 F.2d 73 (8th Cir. 1969). Both cases, however, predated *Gilmer*, and neither case considered the forum selection issue of *where* statutory claims must be decided. The question in *McAlester* was whether the RLA preempted a race discrimination claim under 42 U.S.C. § 1981. *See* 851 F.2d at 1253 ("The RLA does not repeal or preempt claims under § 1981."). *Norman* considered whether a Title VII suit over the classification of employees as train porters rather than brakemen was barred because it presented a dispute "that only the National Mediation Board . . . had jurisdiction over." 414 F.2d at 75. The court held that there was "no representational dispute so as to give the National Mediation Board jurisdiction." *Id.* at 81. Unlike our case, no claim was made in *Norman* that a Title VII claim must be submitted to an RLA arbitrator.

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH CONTROLLING SUPREME COURT PRECEDENT.

A. In *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), the Court broadly delineated the types of disputes that must be submitted to RLA grievance-arbitration processes. The Court identified two encompassing categories of claims that must be resolved by RLA procedures: those that relate "to the meaning or proper application of a particular provision [in a collective bargaining agreement] with reference to a specific situation" and those "founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*, e.g., claims on account of personal injuries." *Id.* at 723 (emphasis added). This Court thus made it clear that disputes independent of collective agreements must be arbitrated so long as they are "founded upon some incident of the employment relation." Indeed, this principle is repeated several times in the *Burley* decision.[6]

In *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), this Court reaffirmed the *Burley* analysis by quoting with approval the *Burley*

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[6] *See* 325 U.S. at 724 ("[M]inor disputes . . . inevitably appear in the carrying out of major agreements and policies or *arise incidentally in the course of an employment.* They represent specific maladjustments of a detailed or individual quality.") (emphasis added); *id.* at 724 n.16 (adjustment board handles cases " 'growing out of grievances *or* out of the interpretation or application of agreements' ") (*quoting* Hearings before Comm. on Interstate Commerce on HR 7650, 73rd Cong. 2d Sess. 47 (1934)) (emphasis added); *id.* at 736 (NRAB has jurisdiction "where the grievance arises from incidents of the employment *not covered by a collective agreement*") (emphasis added); *id.* at 736 n.34 (referring to "a grievance arising independently of the collective agreement" and noting that Congress used "generally inclusive language . . . concerning grievances"); *id.* at 738 n.36 (noting that an arbitrable claim can be "found[ed] in a collective agreement *or otherwise*") (emphasis added).

Court's pronouncement that arbitration is required when a " 'claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement.' " 491 U.S. at 303 (*quoting Burley*, 325 U.S. at 723). Thus, contrary to Hirras's suggestion, *Burley* continues to state the controlling legal principles governing the broad scope of RLA arbitration.[6]

Burley's inclusive reading of the RLA arbitration requirements is true to the language Congress used in the RLA to define arbitrable disputes. Section 3 First (i) of the RLA requires the arbitration of "disputes between an employee . . . and a carrier or carriers growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i) (emphasis added). This provision, on its face, clearly delineates two broad categories of disputes that must be arbitrated, one of which —"disputes growing out of grievances"—does not involve the "interpretation or application of agreements." Even

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[6] Hirras's assertion (Petition 18 n.6) that *Conrail* limited *Burley* is belied by both the language of *Conrail* quoted in the text and the character of the *Conrail* status quo dispute. The Court in *Conrail* decided that an employer's unilateral action created a minor dispute, and not a status quo violation (*i.e.*, a major dispute), if it was arguably justified by the collective bargaining agreement. 491 U.S. at 307. It was not necessary for the Court to address specifically other sources of minor disputes, *e.g.*, omitted cases, where the major-minor dispute distinction cannot be an issue.

[7] Hirras (Petition pp. 17-18) suggests that *Burley's* arbitration requirement for claims based on "incident[s] . . . independent of those covered by the collective agreement" is "referring only to claims based on *implied* contract terms." This suggestion makes no sense. As this Court has noted, "collective-bargaining agreements may include implied, as well as express, terms." *Consolidated Rail*, 491 U.S. at 311. Indeed, "the industrial common law—the practices of the industry and the shop—*is equally a part of the collective bargaining agreement* although not expressed in it." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S.

if the Court were inclined to reconsider the application of *Burley* to disputes outside the collective bargaining agreement, Hirras's claim would not provide an appropriate occasion to do so, because the Amtrak collective bargaining agreement specifically prohibits employment discrimination.

B. The Fifth Circuit's decision is consistent with *Gilmer* and its precursors—virtually ignored in Hirras's petition—which endorse arbitration as an appropriate forum for resolving statutory claims. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court held that claims for violations of the federal antitrust laws must be arbitrated, reaffirming that " 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' " *Id.* at 626 (*quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). The Court concluded that "[t]here is no reason to depart from these guidelines [favoring arbitration] where a party bound by an arbitration agreement raises claims founded on statutory rights" since "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 626, 628.

In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court held that the parties must arbitrate statutory claims under § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 *et seq.*). Then, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court required arbitration of claims under § 12(2) of the Securities Act of 1933 (15 U.S.C. § 77*l*(2)). The Court noted that " 'the old judicial hostility to arbitration' . . . has been steadily eroded over the

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574, 581-82 (1960) (emphasis added). Since implied terms are *part* of the collective agreement, it is a nonsequitur to argue that they are also *independent* of the collective agreement.

years' " and that cases resting "on suspicion of arbitration" have "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 490 U.S. at 480-81 (citations omitted) (*quoting Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

In *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), the Court's most recent decision involving the arbitration of statutory claims, the Court extended its pro arbitration principles to the employment discrimination area and held that a stockbroker must arbitrate a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* In requiring arbitration, the Court "note[d] that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." 111 S. Ct. at 1652. The Court reasoned that such congressional intent "will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes." *Id.* According to the Court, "[t]hroughout such an inquiry . . . 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* (*quoting Moses H. Cone Memorial Hosp.*, 460 U.S. at 24). Since Gilmer did not meet "his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act," 111 S. Ct. at 1657, the Court held that Gilmer must pursue his ADEA claim in an arbitral rather than a judicial forum.

In the wake of *Gilmer*, every circuit to consider the issue has required the arbitration of Title VII claims.[8] And in 1991, Congress itself placed its imprimatur on the arbitration of Title VII claims by specifying in the Civil

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[8] *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

Rights Act of 1991 that arbitration of Title VII claims "is encouraged." *Id.* § 118.

Given all of this, the Fifth Circuit's decision requiring Hirras to use the RLA procedures to arbitrate her Title VII claim is an unsurprising application of *Gilmer* and its precursors. Indeed, Hirras's argument against RLA arbitration would create an anomaly: the thousands[9] of stock broker employees subject to the arbitration requirement imposed by the New York Stock Exchange must arbitrate their Title VII claims, but a railroad employee who is subject to an equally broad arbitration requirement *imposed by Congress* is excused from arbitrating her Title VII claims. Nothing in the RLA or Title VII justifies treating Hirras any differently from the plaintiff in *Gilmer*.

C. The Supreme Court cases on which Hirras bases her petition (pp. 13-22) do not impact the Title VII issue decided by the Fifth Circuit in this case. None of those cases involved the forum selection question of arbitrating statutory claims, and all predated *Gilmer*.[10]

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[9] There are more than 85,000 stockbrokers registered with the New York Stock Exchange. *See NYSE Fact Book 1992 Data* p. 93.

[10] Hirras relies on three RLA cases. As noted in the text that follows, *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987), involved a claim that the RLA in effect preempted damage suits under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq. McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 270 (1958) considered and rejected the claim that as a prerequisite to suing under a veterans' rights statute, an employee must "exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the [NRAB]." *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952) was a suit over a union's imposition of a discriminatory agreement. The Court held that the suit was not foreclosed by the jurisdiction of the National Mediation Board or the NRAB, since the "dispute involves the validity of the contract." *Id.* at 774. The *Howard* case was primarily a suit against a union, over which RLA adjustment boards have no jurisdiction. *See* 45 U.S.C. § 153 First (j), (o) and (p). Hirras also relies on the *Gardner-Denver* line of cases—*Alexander v. Gardner-Denver Co.*, 415 U.S. 36

In her petition, Hirras relies in large part on this Court's decisions in *Buell* and *Gardner-Denver*. However, the petition overlooks the significant differences between the holdings in those cases and the forum selection issue in this case. And it ignores portions of the *Hirras* opinion that distinguished *Buell* and *Gardner-Denver* in several important respects.

Hirras contends that the Fifth Circuit "panel distinguished *Buell* on the weakest of bases: *viz.*, that, unlike Title VII (which applies to employees generally), the statute at issue in *Buell*—the FELA—applies *solely to railroad workers*." Petition 16 (emphasis that of Hirras). In making this accusation, Hirras disregards pertinent parts of the court of appeals' opinion. The Fifth Circuit principally distinguished *Buell* because the railroad there was seeking to *eliminate* the FELA cause of action whenever the employee's injury was caused by workplace defects that could be corrected through RLA arbitration proceedings. The court's opinion contrasted the claim preclusion issue in *Buell* with the forum selection issue in *Hirras*, stating "Amtrak does not argue that Hirras is barred from recovering Title [VII] damages, but rather that her claim for damages may be pressed only before the NRAB." Petition 11a. Hirras also fails to advise the Court that the Fifth Circuit distinguished *Buell* because "Title VII, unlike the FELA, encourages parties to resolve employment discrimination suits through arbitra-

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(1974), *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984). Those cases did not arise under the RLA. Rather, they involved the preclusive effect of arbitration awards where the arbitrator's authority derived solely from the contract and the claim submitted was for violation of the contract. In contrast, "the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself." *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 323 (1972).

tion." *Id.* (*citing* § 118 of the Civil Rights Act of 1991).[11]

In relying on *Gardner-Denver*, Hirras fails to acknowledge the differences which distinguish that case, and others like it, from the forum selection issue in this case. First, as the *Gilmer* Court noted, the *Gardner-Denver* line of cases "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims [but instead] involved the quite different issue whether arbitration of contract-based claims precluded subseqeunt judicial resolution of statutory claims." *Gilmer*, 111 S. Ct. at 1657. The present case, like *Gilmer*, does not involve issues of claim preclusion, "but rather [whether Hirras's statutory] claim for damages may be pressed only before the NRAB." Petition 11a.

Second, in *Gilmer*, the Court noted that "because the arbitration [in *Gardner-Denver* and its progeny] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings" and there was "tension between collective representation and individual statutory rights." *Gilmer*, 111 S. Ct. at 1657. *Gardner-Denver* involved an arbitration provision in a collective agreement under § 301 of the Labor-Management Relations Act (29 U.S.C. § 185), where the employee could only file and prosecute a grievance through his union representative. 111 S. Ct. at 58 n.19. In contrast, as noted by the Fifth Circuit, "the RLA guarantees Hirras the right to present her claim, either with or without union involvement, to the NRAB." Petition 10a (*citing* 45 U.S.C. § 153 First (j) and *Burley*, 325 U.S. at 736-38).

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[11] Contrary to the characterization in Hirras's petition, the fact that the FELA applies only to railroads does not provide a "flimsy" basis for distinguishing *Buell*. Indeed, because the FELA applies only to railroads, a finding in *Buell* that the RLA forecloses FELA lawsuits whenever the condition that caused the injury can be challenged through arbitration would have rendered that statute largely meaningless—a change Congress could not have intended.

Third, the *Gilmer* Court distinguished *Gardner-Denver* and its progeny because those cases were not decided under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "which . . . reflects a 'liberal federal policy favoring arbitration agreements.'" *Gilmer*, 111 S. Ct. at 1657 (*quoting Mitsubishi*, 473 U.S. at 625). Indeed, the Court specifically repudiated the "'mistrust of the arbitral process'" expressed in *Gardner-Denver*. 111 S. Ct. at 1656 n.5 (*quoting McMahon*, 482 U.S. at 231-32). As noted by the Fifth Circuit, "the RLA, like the FAA, reflects a liberal federal policy favoring arbitration." Petition 10a. *See, e.g., Pennsylvania R.R. v. Day*, 360 U.S. 548, 554 (1959) (Court noted its "consistent regard for the importance of having disputes between railroad employees and carriers settled by the administrative Board which Congress established for that purpose").[12]

III. THE FIFTH CIRCUIT'S DECISION PROMOTES THE POLICIES OF BOTH TITLE VII AND THE RLA.

It cannot be disputed that the RLA embodies a strong federal policy that grievances of railroad employees must be arbitrated before the tribunal established by Congress. The RLA provides the "mandatory, exclusive, and comprehensive system for resolving grievance disputes," *Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R.*, 373 U.S. 33, 38 (1963), and "[t]his Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board," *Gunther*

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[12] Hirras (Petition 22) notes that the FAA does not apply to contracts of employment of railroad workers. This is a distinction without significance. Although the FAA does not provide federal jurisdiction to enforce a railroad employee's duty to arbitrate disputes, the RLA specifically mandates compulsory arbitration of disputes between railroads and their employees and thereby provides a statutory basis, equivalent to that in the FAA, for enforcing the duty to arbitrate.

v. San Diego & A.E. Ry., 382 U.S. 257, 263 (1965). Likewise, it cannot be disputed that the arbitration of Title VII claims is favored since Congress has expressly "encouraged" the use of arbitration to resolve Title VII claims. Civil Rights Act of 1991 § 118. Accordingly, the Fifth Circuit's decision requiring Hirras to arbitrate her Title VII sexual harassment claim serves the purposes underlying both statutes.

The plethora of Adjustment Board awards cited in Hirras's petition (pp. 22-25) does not alter this reality. Every award cited by Hirras was issued prior to this Court's decision in *Gilmer*—at a time when the state of the law was that arbitration of Title VII claims was not required and would not even be given judicial deference. Indeed, the fact that a dissent based on *Gardner-Denver* occurred in the one arbitral decision cited by Hirras in which a statutory claim of discrimination was considered (Petition 24 n.11), reinforces the fact that the collective thinking of arbitrators at the time—based on pre-*Gilmer* Supreme Court pronouncements—was that statutory discrimination claims were for the courts. *Gilmer* and the Civil Rights Act of 1991 have altered this mind-set. Furthermore, there is no basis for believing that RLA arbitrators cannot decide Title VII claims. As the Fifth Circuit noted, "RLA arbitrators are just as competent as the New York Stock Exchange arbitrators in *Gilmer* and *Alford* to resolve statutory claims of discrimination." Petition 10a.

Moreover, RLA arbitrators do not sit to decide the jurisdictional parameters of the categories of disputes that Congress has delegated to them for adjudication. Rather, the question of what disputes must be arbitrated is for the courts. *See AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 651-52 (1986).

IV. REGARDLESS OF THE OUTCOME IN THE *HAWAIIAN AIRLINES* CASE, THE FIFTH CIRCUIT'S RULING ON HIRRAS'S INTENTIONAL INFLICTION CLAIM IS CORRECT.

Hirras's petition does not brief her contention that this Court should review the Fifth Circuit's holding that her state law intentional infliction claim is preempted by the RLA. However, she asserts that the question presented by the dismissal of her intentional infliction claim "is identical in its substance to the questions that this Court has agreed to hear and resolve in *Hawaiian Airlines*" and that "[t]he only difference is that the applicable state law claim in *Hawaiian Airlines* is based on the Hawaii common law of wrongful discharge while here the state law claim is based on the Texas common law of intentional infliction of emotional injury." Petition 8. Hirras's arguments in this regard are flawed.

The basic holding of the Hawaii Supreme Court was that the discharge claim in that case was "not dependent on an interpretation of . . . any . . . provision of the [collective bargaining agreement]." *Hawaiian Airlines*, 842 P.2d at 645. That is not true in Hirras's case. Hirras's intentional infliction claim is essentially the same as her sexual harassment claim: she was the subject of anonymous phone calls and a note and graffiti from unknown persons and comments from co-workers. "She informed her supervisors but nothing was done. The supervisor failed to prevent the sexual harassment and did not provide a non-hostile environment." Petition 27a ¶ VIII, 29a ¶ XII.

Given Hirras's factual allegations, it is impossible to resolve her intentional infliction claim without interpreting the collective bargaining agreement. As the Fifth Circuit held, "[t]o properly adjudicate Hirras's claim, the district court would have to construe the collective bargaining agreement to determine what actions Amtrak was required to take in response to Hirras's complaints that she was

being harassed." Petition 13a-14a. The collective agreement limits Amtrak's ability to make accusations against or to discipline employees, absent reasonable cause; accordingly, the provisions of the contract are an indispensable ingredient in evaluating the appropriateness of Amtrak's response. The fact that the one co-worker who made sexual comments to Hirras was charged under the collective agreement (and that the proceedings were terminated at Hirras's request) underscores the inextricable relationship of Hirras's intentional infliction claim and the terms of the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, Amtrak submits that the petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SANDY DIANA HIRRAS,
Petitioner,
v.
NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1534

SANDY DIANA HIRRAS,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

A. In our *certiorari* petition, we showed that the two questions presented in this case are closely related to the questions presented in *Hawaiian Airlines v. Norris,* No. 92-2058, which was argued to this Court on April 28, 1994, and is currently pending disposition on the merits.

Respondent concedes that "this Court's decision in *Hawaiian Airlines* could have some impact on this case." Brief of Respondent in Opposition ("Resp. Br.") at 6 n.4. But respondent nevertheless argues that the pendency of *Hawaiian Airlines* does not even provide a basis for holding the petition here for the disposition of *Hawaiian Airlines.* That argument is doubly flawed.

1. By respondent's own admission, "this Court's decision in *Hawaiian Airlines* could have some impact on this case," as that decision will likely "address the scope of the grievance-abitration procedure created by the [Railway Labor Act]." Resp. Br. 6 n.4. That is more than a sufficient reason in itself for this Court to hold the instant petition until the decision in *Hawaiian Airlines.*

2. Respondent's efforts to distinguish the issues in this case from those in *Hawaiian Airlines* are entirely without merit.

a. Respondent asserts that "*Hawaiian Airlines* does not involve the forum selection issue presented in this case." Resp. Br. 6. n.4.[1] This assertion is factually incorrect.

Hawaiian Airlines has presented to this Court the same theory regarding the scope of the RLA grievance adjustment boards' exclusive jurisdiction that AMTRAK proffers here.[2] Moreover, the respondent airline employee in *Hawaiian Airlines* and the petitioner railroad employee here have provided the same counter: *viz.* that the RLA grievance adjustment boards have "exclusive jurisdiction" *only* over claims based on rights that are derived from the agreements and understandings between the collective-

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[1] The "forum selection issue" refers to the issue raised by respondent's theory, adopted by the court below, that Congress has vested the grievance adjustment machinery of the RLA with "exclusive jurisdiction" over *any* employee claims against RLA-covered employers, as long as the claims are "founded upon an incident of the employment relationship between [the employee] and [the RLA-covered employer]." Pet. App. 8a; *see also id.* at 4a.

[2] *See, e.g., Hawaiian Airlines,* Opening Brief of Petitioner at 30 ("the RLA dispute mechanism procedures are mandatory and exclusive for all disputes within the RLA's scope . . . [and] RLA jurisdiction extends to disputes over discipline and discharge where the grievance arises from incidents of the employment relationship not covered by a collective agreement"; internal quotation marks omitted). *See generally Hawaiian Airlines,* Opening Brief of Petitioners, at 9-11, 23-30; *Hawaiian Airlines,* Reply Brief of Petitioners, at 14-17.

bargaining parties, and *not* over claims based on independent public law rights of the individual employees. *See Hawaiian Airlines.* Brief for Respondent 15-40.

b. In an argument limited to Question 2 in the petition, respondent asserts that the employee's state law claims in *Hawaiian Airlines*, unlike the employee's state law claims here, are "not dependent on an interpretation of . . . any . . . provision of the [collective bargaining agreement]." Resp. Br. 18 (quoting *Hawaiian Airlines*, 842 P.2d 634, 645 (Haw. 1992) (ellipses and brackets in Resp. Br.)). Once again, respondent is wrong.

In this case, as in *Hawaiian Airlines*, an employee (who happens to work under an RLA-covered collective bargaining agreement) asserts *state law rights* regarding workplace conditions, and contends that an action asserting such rights is *not* preempted by the RLA as long as the rights at issue are public law rights that apply to employees generally, rather than rights under the RLA-governed collective bargaining agreement. And, in this case, as in *Hawaiian Airlines*, the employer contends that federal law preempts any state law actions which would require examining working conditions that happen to be subject to an RLA-governed collective bargaining agreement—regardless of the source of the rights at issue—since a court, in any such action, may have to construe the RLA agreement. The Hawaii Supreme Court adopted the employee-plaintiff's understanding that federal law does not preempt such a claim; the court below adopted the employer-defendant's preemption theory. These different understandings of federal law—and not some difference in the facts or issues presented—explain the contrary dispositions of the state law claims in the Hawaii Supreme Court's *Hawaiian Airlines* decision and in the Fifth Circuit's decision below.

Thus, as we demonstrated in the petition, this Court should, at the least, hold the instant petition pending disposition of the *Hawaiian Airlines* case.

B. Respondent's assertion that the decision below does not conflict with the decisions of any other federal courts of appeals (*see* Resp. Br. 6-8), is no more persuasive.

1. The Fifth Circuit candidly admitted that its decision is in conflict with a decision of the Second Circuit. *See* Pet. App. 12a (rejecting petitioner's reliance on *Bates v. Long Island R.R.*, 997 F.2d 1028 (2d Cir.), *cert. denied*, 61 L.W. 3375 (1993), because "the Second Circuit erred in *Bates*").

Nevertheless, respondent argues that *Bates* involved a federal claim under "an entirely different statute: § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794," and that an "[a]ccommodation of the RLA with other employment legislation cannot be undertaken categorically, but should be considered on a statute by statute basis." Resp. Br. 7.

The difficulty is that neither the decision below, nor respondent's overall theory of this case, rests on any such statute-by-statute analysis. Thus, the decision below explained its theory of dismissal in the broadest of terms, which clearly conflict with the *Bates* holding and rationale: Petitioner's federal statutory claim was held subject to dismissal because it "is founded upon an incident of the employment relationship between her and [her RLA-covered employer] thus making her claim a minor dispute under the RLA and subject to the exclusive jurisdiction of the NRAB." Pet. App. 8a.[3] And, similarly, respond-

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[3] In arguing that the decision below rests on a particularized analysis of Title VII—rather than on any broad theory regarding the scope of RLA "exclusive jurisdiction"—respondent notes that the court below cites § 118 of the Civil Rights Act of 1991, which, in the Title VII context, encourages "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration." Pub. L. No. 102-166, § 118. Although the decision below did, in one brief sentence, note the existence of this provision, *see* Pet. App. 7a-8a, that decision does not rest its holding on any such narrow basis. In any case, as we

ent argued below—and, indeed, argues elsewhere in its brief in opposition—precisely the same broad theory of dismissal that was accepted below and rejected in *Bates*. *See* Resp. Br. 9 ("the types of disputes that must be submitted to RLA grievance-arbitration processes" encompasses all "disputes independent of collective agreements . . . so long as they are 'founded upon some incidents of the employment relation' ").[4]

2. Respondent urges as well that the decision below presents no conflict with the decisions of the Eighth and Tenth Circuits, on which we relied in our petition. But, as is true of the Second Circuit's *Bates* decision, the decisions of the Eighth and Tenth Circuit squarely reject the proposition that is the cornerstone of respondent's theory—and the theory of the court below—*viz.*, that the "exclusive jurisdiction" of the RLA grievance adjustment boards deprive a federal court of jurisdiction over an

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show, *infra* at pp. 6-7, § 118 of the 1991 Civil Rights Act cannot even plausibly provide support for the decision below.

[4] In a further effort to distinguish *Bates*, respondent argues that the employer there had sought to have the employee's employment-related statutory claims dismissed from court without explicitly asserting that those same claims could properly be brought before the RLA adjustment boards. But even the briefest examination of *Bates* shows that the employer's argument there and the employer's argument here are essentially the same. Both employers argued, in the words of the *Bates* court, that a district court "lack[s] subject matter jurisdiction over" federal, employment-related, statutory claims against an RLA-covered employer, because such claims "are 'minor disputes' under the RLA," and, as such "must be resolved pursuant to the exclusive dispute resolution procedures outlined in § 3 of the RLA. 45 U.S.C. § 153." 997 F.2d at 1034. And, both employers argued that *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), bolsters this theory, by establishing a federal policy supporting the dismissal of federal employment-based claims in favor of their resolution elsewhere. *Id.* The only significant difference between the *Bates* decision and the decision below is that the Second Circuit squarely rejected these employer arguments and the Fifth Circuit fully accepted them.

employee's independent, federal, employment-related, statutory causes of action. *See McAlester v. United Airlines*, 851 F.2d 1249, 1252, 1254 (10th Cir. 1988) (rejecting employer's contention that RLA's "minor dispute" system "precludes the district court's subject matter jurisdiction over [independent federal statutory] claim," because policy of exclusive jurisdiction "does not apply necessarily to independent rights or claims derived from *federal* statutory schemes"); *Norman v. Missouri Pacific Railroad*, 414 F.2d 73, 83 (8th Cir. 1969) (rejecting theory that "the Railway Labor Act . . . place[s] exclusive jurisdiction over [actions to enforce federal statutory rights] in . . . [the] National Adjustment Board").

Thus, as we demonstrated in the petition, there is a clear conflict in the circuits on this important issue.

C. Although we generally anticipated respondent's arguments on whether the decision below is correct (*see* Pet. 13-25), and, therefore, rest on our prior submission in that regard, respondent's brief in opposition does raise one new argument that warrants a response: *viz.*, that the decision below is mandated by the authority of new legislation, § 118 of the Civil Rights Act of 1991, which declares that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." Pub. Law 102-166, § 118.[5]

The fair reading of this language is that § 118 refers to "arbitration" in its normal sense: *viz.*, an alternative dispute resolution procedure mutually and voluntarily agreed upon by the parties to the dispute. *See AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a

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[5] As we have already noted, the decision below did not rest, in fact, on that provision. *See* n.3, pp. 4-5, *supra*.

party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").[6]

Petitioner here, has never agreed to the "arbitration" of her dispute. Indeed, respondent's theory has never been that there is any agreement by petitioner to arbitrate; rather, respondent's theory (which we refute in the petition, *see* Pet. 13-25) is that Congress, in passing the RLA, *mandated* that *all* employment related disputes of any nature be considered to be within the "exclusive jurisdiction" of the RLA's grievance adjustment boards.

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[6] Moreover, the legislative history of § 118 makes clear that *all sides in the Congress agreed*—although there was disagreement on other issues relating to § 118—that the provision should not support the dismissal of Title VII court claims in the absence of the Title VII parties' knowing and voluntary agreement to arbitrate.

This was certainly the view of the provision's Democratic sponsors, who believed that § 118 should *never* support the dismissal of a Title VII court action. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 97 (1991) (§ 118 encourages only "the use of alternative dispute resolution mechanisms [where they] supplement, not supplant, the remedies provided by Title VII. Thus, for example, . . . any agreement to submit disputed issues to abitration . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."); *id.*, pt. 2, at 41 (same); 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (Rep. Edwards) (provision "is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available"). *Cf.* H.R. Rep. No. 40, *supra*, pt. 2, at 78 (minority views) (complaining that the provision does not promote the use of arbitration as an alternative to the courts, even where arbitration agreements are "knowingly and voluntarily undertaken").

And this was also the understanding of § 118's Republican supporters, who emphasized the need for "knowing and voluntary" agreements. *See* 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (Rep. Hyde) (§ 118 only operates to promote alternative methods for resolving Title VII disputes "where the parties knowingly and voluntarily elect to use these methods"); *id.* at S15478 (daily ed. Oct. 30, 1991) (Sen. Dole) (same).

Thus, § 118 simply has no relevance to respondent's theory.[7]

CONCLUSION

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[7] Despite the fact that petitioner has never agreed to arbitration, respondent repeatedly relies on cases dismissing court actions because the parties to the actions in question had *agreed* to arbitration. *See* Resp. Br. 11-13 & 15-16. Respondent argues that reliance on these cases is justified because Congress' decision to subject all employee claims to the jurisdiction of the RLA grievance adjustment boards is the functional equivalent of an individual's agreement to arbitrate. *See* Resp. Br. 16 n.12. This argument assumes its conclusion and, thus, does not further the enterprise of resolving the matter at issue in this case: *viz.*, *whether* Congress ever made such a decision. And, as the petition demonstrates, Congress has not made any such decision. *See* Resp. Br. 11-13 & 15-16.